No. 16224

In the United States Court of Appeals for the Ninth Circuit

JAMES FLOOD and MARY EMMA STEBBENS, as Trustees of the Trust created by Paragraph III of the Last Will of James L. Flood, deceased, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of California, Southern Division

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BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

The opinion of the district court (R. 62-77) is reported at 157 F.Supp. 438. The findings of fact and conclusions of law appear in the record at pages 77-85.

JURISDICTION

The United States instituted these condemnation actions to acquire a temporary interest in property owned by appellants (R. 1-14, 33-41). The acquisition was under authority of the Public Buildings Act

of August 27, 1935, 49 Stat. 886 (40 U.S.C. sec. 304c), as amended by the Act of June 14, 1946, 60 Stat. 257; the Federal Property and Administrative Services Act of June 30, 1949, 63 Stat. 377; and the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec 257 (R. 4). Judgment of the district court was entered June 10, 1958 (R. 86-88). Notice of appeal was filed August 7, 1958 (R. 88). The jurisdiction of the district court rested on 28 U.S.C. sec. 1358. The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTION PRESENTED

The United States condemned the right to occupy a building for three and one-half years. It made alterations to adapt it for use as a federal office building. The question is:

Whether, upon return of the property to the owner, the United States must pay, in addition to a fair market rental, the cost of restoring the building to its original condition even though the alterations caused no diminution in its fair market value.

STATEMENT

The United States filed a complaint in condemnation on January 29, 1951, to acquire the right to use and occupy for federal office space a building owned by appellants for a term commencing February 1, 1951, and ending June 30, 1951, extendible for yearly periods up to June 30, 1955 (R. 1-7). An order granting the right to possession on February 1, 1951, was entered on the same day (R. 8-9). The build-

ing is known as the Flood Building located at 870 Market Street in San Francisco, California (R. 12). It contains 12 stories and a basement. On May 15, 1951, possession of the ground floor and substantially all of the basement area was returned to appellants (R. 9-11, 78).

To reflect that change in the space occupied, the United States did not extend the original term taken but filed a new complaint on June 29, 1951, to acquire use and occupancy of the building, less the portions surrendered, for a term commencing July 1, 1951, and ending June 30, 1952, extendible for yearly periods until June 30, 1956 (R. 33-38). On September 28, 1951, possession of the second floor was returned to appellants (R. 39-42, 78). The Government remained in possession of the upper 10 floors of the building until June 30, 1954 (R. 64).

The two cases were consolidated for trial on the issue of compensation (R. 17). The parties agreed upon the compensation to be paid for the use and occupancy of the premises, i.e., the reasonable rental value for the 41 months that the Government was in possession (R. 18, 45, 78), and final judgments were entered on October 21, 1954, fixing the compensation in the agreed amounts (R. 23, 50).

The parties were not able to agree, however, on the compensation owing, if any, by reason of the failure of the Government to restore the premises to the condition in which they were at the time of the taking, ordinary wear and tear excepted. Appellants contended that the Government was required to restore the building to its original condition and

that, in electing not to restore it, the Government became liable for the reasonable cost of restoration, plus rental for the period required to restore it (R. 64-65). The Government insisted that the owners have no immutable right to the cost of restoring the building, that just compensation is satisfied by paying them the diminution in market value of the property, if any, caused by the Government's alterations (R. 65). Accordingly, the rental value judgments recited that jurisdiction was retained to try that issue (R. 32, 61, 79).

At the trial before the court, it was established that prior to the Government's occupancy the top six floors had been rented almost exclusively to medical and dental tenants and that the remaining floors, except the ground floor (stores), were used for general office occupancy (R. 80). The Government made extensive alterations at a cost of $225,000 (R. 80-81). As the court found (R. 81): "The final result achieved by such remodelling was to change the medical and dental suites into large offices adapted to general office usage."

Appellants estimated that the cost of restoring the building to its condition as of February 1, 1951, would be $600,600 (R. 65). The Government, while opposing the requirement of restoration, put the cost at $401,000 (R. 65). Both figures were based on new materials without reflecting depreciation. In addition, appellants claimed $178,000 as reasonable rental value for the period required to restore (R. 65). The Government fixed a shorter term and valued it at $40,000 (R. 66).

The district court concluded that the Government "was under an obligation to return" the premises in the condition in which they had been received by it, reasonable wear and tear excepted, and that it had "breached its said obligation" (R. 84). Then, in ascertaining the compensation owing because of the breach, the court found the following facts (R. 81-83):

IX.

When plaintiff took possession of the building on February 1, 1951, it did not disrupt a going medical-dental operation, since defendants had themselves theretofore caused all the medical and dental tenants, and all other tenants, in the building to vacate.[1]

X.

Upon resuming possession of said Flood Building on July 1, 1954, defendants embarked on a campaign to rent space in said building for multiple general office purposes as distinct from medical-dental. This campaign was singularly effective, for by January, 1956, the office space in the building was ninety to ninety-five percent occupied by general office tenants. No effort whatever was made by defendants to secure medical-dental tenants.

XI.

The net return before insurance and depreciation, for the third through the twelfth floors of

[1] As explained in the court's opinion (R. 63), the property had been leased to F. W. Woolworth Company, effective February 1, 1951. That Company was going to demolish the existing building and erect a new one.

said Flood Building, as of January, 1956, for its then use of general office occupancy was $1.55 to $1.60 per square foot per year, or approximately $85,000 greater than the net return of $1.05 per square foot per year, for the second through the twelfth floors, for the best year of the Flood Building's history, while operated as a medical-dental building.

XII.

In 1951, and for some years before, the Flood Building had ceased to be competitive in the medical-dental tenancy field, with the new and modern medical-dental office buildings in San Francisco, which were especially designed for use by physicians and dentists, such as the Fitzhugh Building, and the 490 Post Street Building and the 450 Sutter Street Building.

XIII.

At the time possession of the Flood Building was turned back to defendants on June 30, 1954, the condition set forth in Paragraph XII continued to exist, and was, if anything, aggravated by a considerable movement during the years 1953 and 1954 of tenants from medical buildings in downtown San Francisco to outlying and suburban areas.

XIV.

The three hundred or more medical and dental tenants which defendants caused to vacate the Flood Building in 1950 and 1951, had reestablished themselves in other buildings in downtown San Francisco and outlying suburban areas, in

most instances at great expense to themselves, before June 30, 1954, and that prospective market was lost forever to defendants.

XV.

The highest and best use of the Flood Building, as of the date of its return to defendants, namely, June 30, 1954, was no longer for medical and dental tenancies, but rather for multiple general office usage.

* * * *

XVII.

The Flood Building suffered no diminution in market value by reason of the plaintiff's taking, or the changes made by the Government during its occupation. The fair market value of the building when returned on June 30, 1954, was as great as it would have been had it been returned on that date in the condition in which it was taken in 1951.

The court held (R. 75-76) that: "The criteria which has long been held to measure just compensation is that the owner is entitled to be put in as good position pecuniarily as he would have occupied if his property had not been taken. * * * The owners here have simply failed to demonstrate that they have suffered any pecuniary deprivation. For them to demand that the public is obliged to pay them almost a half a million dollars, which would presumably be used to re-install the medical-dental facilities, though their building continued to be as valuable as it was prior to the government taking, is to reimburse them for the particular values which they attach to the

building." Accordingly, judgment of no compensation for this aspect of the taking was entered on June 10, 1958 (R. 88). This appeal followed (R. 88).

SUMMARY OF ARGUMENT

I

There are fundamental differences between the rules of law governing property occupied under lease-contract and eminent domain. One is consensual, the other is not. The purpose of contract actions is to enforce particular promises or intentions derived from express provisions throughout the instrument. There are no such promises or intentions in the exercise of eminent domain. Thus, while contract law may be consulted in determining the compensation owing for a temporary taking, the difference must be borne in mind with respect to particular cases and the analogy must stop where it impinges upon settled principles of eminent domain law.

In any event, the federal rule is that, even when property under lease is returned without restoring it to its original condition (ordinary wear and tear excepted), diminution in market value of the property caused by the failure to restore is the measure of damages. In instances where the cost of restoration has been awarded it was, in fact, awarded as evidence of or the measure of the diminution in market value. Accordingly, appellants, whose property has not been diminished in market value, are not

entitled to restoration costs by analogy to the law governing lease contracts.

II

Independently, settled principles of eminent domain law prohibit compensation in excess of diminution in fair market value. The compensation to which a condemnee is entitled means that he shall be put in as good a position pecuniarily as he would have been if his property had not been taken. The sum does not depend upon the uses to which he has devoted his property but is to be arrived at upon just consideration of all the uses for which it is suitable. It is the property that is safeguarded by the Constitution and not the subjective desires or uses of the owner. Following those principles, the federal courts have held that where the United States has caused injuries to property temporarily taken, for which it is liable in addition to the fair rental value, the measure of the additional liability is the amount by which such injuries diminish the fair market value of the property. The costs of restoration may be evidence of the amount of the decreased market value but they may not be awarded if they exceed the diminution in such value.

III

Moreover, the building had ceased to be a going medical-dental operation at the time of the Government's taking since the owners had themselves vacated all such tenants in contemplation of demolition. Therefore, under the facts as found by the

trial court, there is no basis for imposition upon the United States of a duty to re-create that medical-dental operation.

ARGUMENT

I

APPELLANTS ARE NOT ENTITLED TO RESTORATION COSTS BY ANALOGY TO LAW GOVERNING LEASE CONTRACTS

Appellants' building was occupied by the United States under the power of eminent domain, not under lease-contract. While the contractual relationship of a landlord and tenant may be consulted in some of its aspects in determining the compensation owing for a temporary taking, the analogy to contract in an eminent domain matter must stop where it impinges upon settled principles of eminent domain law. *United States* v. *Certain Parcels of Land in Philadelphia*, 86 F.Supp. 676, 677 (E.D. Pa. 1949). "The owner's right does not depend on contract, express or implied." *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 304 (1923). The difference between the two is fundamental and great. One is consensual, the other is not. The analogy fails, for example, where the Government enters into possession under lease, erects permanent improvements and then condemns the fee. Ordinarily, such improvements by a tenant become the property of the landlord at the time they are affixed to or incorporated in the realty. That is not true under eminent domain law when they have been erected by the Government or a corporation having eminent domain power. Thus, in

Bibb County, Georgia v. *United States*, 249 F.2d 228 (C.A. 5, 1957), the court said (p. 230):

> * * * appellant takes too restricted a view of the facts as a whole and of the controlling equitable principles and, by a bare bones argument which presents the case as a mere controversy between a Georgia landlord and tenant over fixtures, strips it of its life giving, its flesh and blood, elements. * * * it would be a clear perversion of justice to permit the invocation of the dry as dust legal principles as to fixtures controlling the relation of an ordinary landlord and tenant; * * * When the United States or other governmental body has constructed improvements upon land not owned by it but of which it is in possession under circumstances such as this case presents, and brings proceedings to condemn the fee of the land, the equitable principle which condemns unjust enrichment prevents the value of these premises becoming a windfall to the owner of the land in the guise of fair compensation.

To the same effect are: *Searl* v. *School District, Lake County*, 133 U.S. 553, 562 (1890); *Anderson-Tully Co.* v. *United States*, 189 F.2d 192, 196 (C.A. 5, 1941), cert. den. 342 U.S. 826; *United States* v. *Smith*, 110 Fed. 338, 340 (E.D. N.Y. 1901); *Norfolk & O. V. Ry. Co.* v. *Consolidated Turnpike Co.*, 111 Va. 131, 68 S.E. 346 (1910), affirmed under reverse title, 228 U.S. 596 (1913); 34 A.L.R. 1083; L.R.A. 1916 F. 980. Cf. *Old Dominion Co.* v. *United States*, 269 U.S. 55 (1925).

Another instance where the analogy must fail would be "a speculative and exorbitant price" paid

for property or a high value fixed because of a "unique need" for it or an "idiosyncratic attachment" to it. *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5 (1949); *Olson* v. *United States*, 292 U.S. 246, 255 (1934). As stated in the former case (p. 5), "such personal and variant standards as to value" must yield in eminent domain to a "transferable value [that] has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use."

Appellants purport to rely on that concept and urge its enforcement here (Br. 17, 33). Plainly, however, the factual situation presented shows that appellants are seeking, as the district court noted (R. 76), reimbursement "for the particular values which they attach to the building" rather than the objective, "transferable value" of "external validity" in the market place.

In instances of taking for a term, the analogy to contract may be used in ascertaining the extent of the taking (the owner's loss). Certainly, as in the case of a lease contract, the owner has sustained pecuniary loss not compensated by the "fair market rental" if his property is damaged beyond ordinary wear and tear. A value inhering in his property has been taken from him *pro tanto* and he is entitled to be paid for that loss. This would undoubtedly be true without reference to contract law but the analogy is helpful in showing that the courts recognize the substantiality of such a loss by finding an implied covenant to indemnify for it in lease contracts

where a contrary intention is not express. A danger is present, however, in relying on particular cases because essentially a contract action is to enforce particular promises or intentions derived from express provisions throughout the instrument flowing from the mutual intent of the parties. Thus, an implied covenant not to commit waste may be enlarged by an express covenant to keep in good repair and the latter may be treated differently from a covenant to return in as good condition as received which, in turn, may be distinguished from a covenant to return in the same condition, etc., and all depend upon the general intention of the parties under the particular facts. E.g., *Henry H. Cross Co.* v. *Rice*, 45 F.2d 940, 943 (C.A. 7, 1931); *Ten-Six Olive* v. *Curby*, 208 F.2d 117, 122 (C.A. 8, 1953).

As to the measure of indemnification or compensation, again reference may be made to contract law but only to the extent that it does not conflict with settled principles of eminent domain law and always subject to the warning that each contract ruling seeks to ascertain and enforce the intention of the parties in a consensual transaction. In a conventional lease, a tenant may covenant to maintain the property in good repair. 32 Am. Jur., Landlord and Tenant, sec. 788; 51 C.J.S., Landlord and Tenant, sec. 409. But in the absence of an express covenant, he impliedly covenants only against waste. *United States* v. *Bostwick*, 94 U.S. 53 (1876); *New Rawson Corporation* v. *United States*, 55 F.Supp. 291, 294 (Mass. 1943); 32 Am. Jur., Landlord and Tenant,

sec. 779; 51 C.J.S., Landlord and Tenant, sec. 408. Waste may include substantial injury for lack of essential repair and substantial alterations not consented to. 4 Thompson, *Real Property* (1940 ed.), secs. 1608 and 1615. "Damages for waste are usually measured by the injury actually sustained by the inheritance, the diminution of the market value caused by the injury." 4 Thompson, *Real Property* (1940 ed.), sec. 1622; *Campeau* v. *Hobbs*, 259 Mich. 93, 242 N.W. 850 (1932); *Winans* v. *Valentine*, 152 Ore. 462, 54 P.2d 106 (1936); *In re Stout's Estate*, 151 Ore. 411, 50 P.2d 768, 101 A.L.R. 672 (1935). "If the injury is easily reparable, the cost of repairing may be recovered. But it must be shown that the repairs were reasonable; and if the cost of repairing the injury is greater than the diminution in market value of the land, the latter is always the true measure of damages. Strictly speaking, therefore, the cost of repairs is not the measure of damages but only evidence of the amount of damages." III Sedgwick, *Damages* (9th ed., 1920), pp. 1918-1920, sec. 932.

Thus, in *Realty Associates, Inc.* v. *United States*, 134 C.Cls. 167, 138 F.Supp. 875 (1956), the Government leased textile mill property for four years. During its occupancy, the Government spent more than $558,000 in modernizing and improving the property. The owner sued for damages for failure to restore the property to the same condition that existed at the beginning of the lease, there being a provision in the lease requiring it. The court held that the owner's insistence upon technical applica-

tion of the lease provision was untenable in view of the greatly increased value of the property resulting from the Government's improvements. The court said (134 C.Cls. at pp. 171-172):

> If this were a suit for specific performance, the plaintiff might well compel the defendant to actually restore the property to the status and condition which prevailed in May 1943, upon the performance of which the property would again become practically useless.[2] I am sure the plaintiff would not have thought of instituting such a suit because it is inconceivable that it would have wanted the property restored to its previous condition which had produced years of idleness. In the light of the entire record it is difficult to believe that plaintiff in good faith wanted any of the items restored.
>
> To hold that in spite of the vast increase in the value of the property and the lack of damage caused by any action of the defendant, the plaintiff nevertheless is entitled to recover in addition to the mythical cost of restoring the property is inconceivable. To hold that the technical wording of the lease would justify an award of $220,000, or anything like that amount in damages which are practically nonexistent, runs counter to every tenet of justice and fair play which we have known from our youth up.

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[2] We doubt whether any equity court would order such a useless and wasteful act. In any event, the United States has not consented to specific relief but only for money damages. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949). Appellants' claim, which is beyond actual damage suffered, amounts to an assertion of a right to specific relief.

> Plaintiff takes a simple technical wording of a lease, carries it along the road to a pure legalism, and from there on to an absurdity. Somewhere along the way the spirit of the law is lost, falls into a dreamless sleep, and lies in an unmarked spot.
>
> * * * *
>
> * * * We suppose it is as natural for a human institution to look after its own interests as it is for the sparks to fly upward, but in order to justify recovery in this case the plaintiff must show actual damages by virtue of the breach of the contract which, in our judgment, it has not shown.

In *Georgia Kaolin Co.* v. *United States*, 214 F.2d 284 (C.A. 5, 1954), cert. den. 348 U.S. 914, the Government occupied land under a transferred lease which contained a provision obligating the Government as the sublessee to restore the premises to the same condition as that existing at the date of the lease, reasonable and ordinary wear and tear and damage by the elements excepted. The United States used the land for a target area and the property was impregnated with live shells and explosives to such an extent that the plaintiff could not thereafter use the property for mining purposes. The plaintiff asserted that it had acquired the property for the purpose of mining kaolin and that the Government had breached its contract by failing to restore the premises to their original condition. The plaintiff sought to recover the value of the kaolin in the ground. The court of appeals held that the measure of damages is one of law and that the plaintiff was

entitled to recover the difference between the value of the land at the time of the lease and its diminshed value because of its use and the condition in which it was returned to the owner.

In *Fuselier* v. *United States,* 111 F.Supp. 471 (W.D. La. 1953), the plaintiffs sought to recover $3,890 as the cost of removing concrete emplacements and earthen works constructed on their property by the United States under a lease. The proof established that it would cost $3,890 to remove those facilities and to restore the premises. The Government, however, proved that the damage, if the concrete emplacements and earthen embankments remained, would not exceed the sum of $55 an acre for only 5.53 acres of the 154 acres under lease. The lease did not expressly obligate the United States to remove the structures or to restore the premises. However, the court noted in its opinion (p. 473) that the "plaintiffs contend it arises by necessary implication, which, for the purposes of this case, may be conceded." The court noted further that:

> * * * Clearly the expenditures of $3890 would add only about $300 to the value of the property for any purpose for which it was fitted at the time of the expiration of the lease and breach of the contract.
>
> The plaintiffs can now use the property, except the small acreage indicated, for all purposes for which it was available prior to the lease and to allow recovery of the cost of removal would simply result in their enrichment to the extent of some $3,500 in excess of the actual loss, which they could spend or not as they saw fit for removing the obstructions.

Accordingly the court held that the plaintiffs were (pp. 473-474):

> * * * entitled to judgment for 5.53 acres at $55 per acre as damages to the land due to the failure to remove obstructions and the value of the timber and other expenditures for changing the irrigation are stipulated in the record.

In *Crystal Concrete Corp.* v. *Town of Braintree,* 309 Mass. 463, 35 N.E. 2d 672 (1941), the Town leased land with the right to remove sand and gravel. The lease permitted removal only to a certain depth and required smoothing off the surface where the excavating had been performed. The owner sued for damages for breach of the latter agreements. The court said (pp. 469-471):

> The plaintiff is seeking not specific performance but damages. It is entitled to be put in the same position that it would be in if the Town had performed the terms of the lease. * * *
>
> A lessee who breaches a provision of the lease requiring him to make certain repairs or to deliver up the premises at the termination of the lease in a certain condition is liable in damages for the reasonable cost of making such repairs or of putting the premises in the condition prescribed by the lease [citing cases] but the plaintiff is not to be put in a better position than it would have been if the defendant had performed the terms of the lease. The location and character of the demised premises must be considered; and the reasonable cost of repairs, in some instances, would furnish the proper measure of damages while in other instances the value of the premises may be such that the in-

> currence of expense for repairs would not be a reasonable, practical, or economical method of dealing with the property. Such expense might greatly exceed any diminution of the fair market value of the loss that was caused by the defendant's nonperformance of the provisions of the lease. * * * The diminution in the fair market value of the premises that resulted from the defendant's conduct was the proper measure of damages. The cost of repairs would be competent evidence of this difference in value, but the location and physical character of the premises as set forth by the master would not warrant charging the defendant with several thousand dollars in excess of this difference in refilling and grading the 3 acres where excavating had been performed.

To the same effect are: *Henry H. Cross Co.* v. *Rice*, 45 F.2d 940, 943 (C.A. 7, 1931); *Zoslow* v. *National Savings & Trust Co.*, 91 U.S. App. D.C. 391, 201 F.2d 208 (1952); *Gardner* v. *Darling Stores Corp.*, 242 F.2d 3, 7, 63 A.L.R.2d 1105 (C.A. 2, 1957); *In re Jewell*, Fed. Cas. No. 7302 (S.D. N.Y. 1879); *Cecil* v. *United States*, 67 C.Cls. 398 (1929); *Eastern Steamship Lines, Inc.* v. *United States*, 125 C.Cls. 422, 112 F.Supp. 167 (1953); *Eaddy* v. *United States*, 134 C.Cls. 338, 342, 139 F.Supp. 49 (1956); *Murray* v. *Patterson*, 18 Tenn. App. 30, 72 S.W.2d 559, 564 (1934); *Hickman* v. *Wellauer*, 169 Wis. 18, 171 N.W. 635 (1919); *Zindell* v. *Central Mutual Ins. Co.*, 222 Wis. 575, 269 N.W. 327 (1936); see also cases discussed in 123 A.L.R. 515 ff. and 61 Harv. L. R. 113, 154, and compare *Erceg* v. *Fairbanks Exploration Co.*, 95 F.2d 850, 852-853 (C.A. 9,

1938), cert. den. 305 U.S. 615; *Carr* v. *United States*, 28 F.Supp. 236 (W.D. Ky. 1939). The United States Court of Claims, as recently as July 13, 1959, has re-affirmed its position, stating in *Janice N. Spitzel* v. *United States:* [3]

> The plaintiffs contend that the measure of damages should be the cost of restoring the land to the condition it was in when the defendant first took possession. But this court has held that where the cost of restoration exceeds the diminution in the fair market value, as in the case at bar, the measure of damages shall be the diminution in the fair market value.

While federal law governs such matters affecting the "essential interests" of the United States (*United States* v. *93.970 Acres of Land*, —— U.S. —— (June 22, 1959); *United States* v. *Miller*, 317 U.S. 369, 379 (1943); *Riverview Properties* v. *United States*, 102 F.Supp. 934, 937 (M.D. Pa. 1952)) the foregoing is plainly the law between individuals in California where appellants' property is located. *Avery* v. *Fredericksen & Westbrook*, 67 Cal.App. 334, 154 P.2d 41 (1945). Thus, just as the federal rule is that to permit recovery of "the mythical cost of restoring the property is inconceivable" where it vastly exceeds diminution in market value (*Realty Associates, Inc.* v. *United States*, 134 C.Cls. 167, 171, 138 F.Supp. 875 (1956)), so also in California the cost of restoration is not the measure of damages where such cost "may far exceed any injury result-

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[3] Copies of this unreported opinion have been filed with the clerk.

ing from it in its present condition, and in that case it is not probable that the amount recovered would ever be used for that purpose." (*DeCosta* v. *Massachusetts Mining Company*, 17 Cal. 613, 617 (1861).

Therefore, the court below in the present case correctly held that, even under an express covenant to restore, the tenant has no "immutable duty to pay the costs of restoration" (R. 73, 75) and that such costs are to be considered only if the "property is of such a kind that damage or destruction deprives it of its ordinary utility, and economic necessity dictates that it be restored to its original condition" in which events "the cost of restoring it would approximate the diminution in market value suffered" (R. 71).

II

APPELLANTS ARE NOT ENTITLED TO RESTORATION COSTS UNDER PRINCIPLES OF EMINENT DOMAIN LAW

When property is taken by eminent domain "The compensation to which the owner is entitled * * * means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. * * * The owner's right does not depend on contract, express or implied." *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 304 (1923); *United States* v. *New River Collieries Co.*, 262 U.S. 341, 343; *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893). In *Olson* v. *United States*, 292 U.S. 246, 255 (1934), the court said:

> That equivalent [for the property taken] is the market value of the property at the time of

> the taking contemporaneously paid in money. * * * It may be more or less than the owner's investment. * * * He is entitled to be put in *as good a position pecuniarily* as if his property had not been taken. *He must be made whole but is not entitled to more.* It is the property and not the cost of it that is safeguarded by state and federal constitutions. * * *
>
> Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. *The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable.* [Emphasis supplied.]

In *United States* v. *Miller*, 317 U.S. 369, 373-375 (1943), the court said:

> * * * The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.
>
> It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, *the courts early adopted, and have retained, the concept of market value.* * * *
>
> * * * It is usually said that market value is what a willing buyer would pay in cash to a willing seller. * * *
>
> [There are] elements which * * * must in fairness be eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part

> with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purposes. These elements must be disregarded by the fact finding body in arriving at "fair" market value. [Emphasis supplied.]

It is plain, therefore, that the Government is liable solely for loss of value inherent in the property. It is "the property * * * that is safeguarded by state and federal constitutions" (*Olson, supra*) and not the subjective desires or "uses" of the owner (*Olson, Miller, supra.*). "[O]nly that 'value' need be considered which is attached to the 'property' * * *." *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5 (1949). That is true, as shown in the latter case (p. 5), because the source and requirement of compensation is the Fifth Amendment which provides: "nor shall private property be taken for public use, without just compensation," and that has always been construed to mean: "just compensation for such property," because the property is all that the Government acquires and frustration of the owner's personal plans "is properly treated as part of the burden of common citizenship." This is further shown by the fact that, unlike a contract action, which is personal, condemnation is a "proceeding *in rem*" and "a taking, not of the rights of designated persons in the thing needed but of the thing itself, with a general monition to all persons having claims in the thing." *United States* v. *Dunnington*, 146 U.S. 338, 352-353 (1892). "The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available

uses and purposes." *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 81 (1913).

Following those principles, the federal courts have held that where the United States has caused or permitted injuries to property temporarily taken, for which it is thus liable to the condemnee in addition to the fair market value, the measure of this additional liability is the amount by which such injuries diminish the fair market value of the property. *United States* v. *Jordan*, 186 F.2d 803, 805-807 (C.A. 6, 1951), affirmed by equally divided court, 342 U.S. 911 (awarded stumpage value for timber only of merchantable size where all standing timber destroyed); *United States* v. *5,901.77 Acres of Land in Marin County*, 65 F.Supp. 454, 456 (N.D. Cal. 1946); *United States* v. *60,000 Square Feet of Land, Etc.*, 53 F.Supp. 767, 771 (N.D. Cal. 1943). Accord: *United States* v. *37.15 Acres of Land in Mariposa County*, 77 F.Supp. 798, 803-804 (N.D. Cal. 1948) (no recovery for destruction of mural decoration, where market value was not reduced and decoration was not restored by condemnee). Cf. *United States* v. *General Motors Corp.*, 323 U.S. 373, 384 (1945) (tenant may recover for "depreciation in value" of his fixtures, etc.)

If it is feasible and reasonable to repair the damage and restore the property to the condition in which it should have been at the end of the term taken, the reasonable cost of such restoration may be taken as indicating the amount by which the damage reduced the value of the property, and in such cases is sometimes loosely referred to as the measure of

compensation. E.g., *United States* v. *37.15 Acres of Land in Mariposa County*, 77 F.Supp. 798, 802-803 (N.D. Cal. 1948); *United States* v. *Certain Parcels of Land in Los Angeles County*, 63 F.Supp. 175, 188 (S.D. Cal. 1945); *In re Condemnation of Lands for Military Camp*, 250 Fed. 314, 315 (E.D. Ark. 1918); *New Rawson Corporation* v. *United States*, 55 F. Supp. 291, 293-294 (Mass. 1943) (conventional lease). In *Kimball Laundry Co.* v. *United States*, 166 F.2d 856, 861, 863 (C.A. 8, 1948), reversed on other grounds but approved as to this point, 339 U.S. 1, 7, the court used "depreciation in value" and "costs of restoration" indiscriminately in describing the measure of liability. However, as required by the basic principles of eminent domain law, the true measure in all cases is the diminution in market value, a distinction which stands out in cases where changes in the property diminish its value less than the cost of restoration, or not at all, or even enhance its value. Thus, in *United States* v. *37.15 Acres of Land in Mariposa County*, 77 F.Supp. 798 (N.D. Cal. 1948), the court awarded the costs of restoration of items necessary to resume operation of a hotel in Yosemite National Park (the only permissible use) undoubtedly as the fair measure of diminution in the market value of the property, because in refusing compensation for other items damaged or destroyed the court said (p. 804):

> The alleged damage to the stucco walls and stencils in no way affects the functioning or utility of the premises as a hotel. * * * Against the background of principles applicable to the

> payment of compensation in condemnation causes, no basis can be found upon which to admeasure compensation. There is no evidence that the market value of defendant's interest in the property as a going hotel has been lessened. Nor does it appear from any evidence that the defendant plans or expects to make any further expenditure of a restorative character as to the walls or stencils. Neither does it appear from any evidence that there is any lessening or decreasing in business income affecting the rental value of the property. Consequently I find no justification in law or in the evidence for calculating or allowing, upon such a speculative or conjectural basis as is here presented, any award for damages with respect to the stucco walls or stencils.

The federal decisions relative to condemnation, relied upon by appellants, do not announce another rule nor support their position. Thus, in *Bass* v. *Metropolitan West Side El. R. Co.*, 82 Fed. 857, 864 (C.A. 7, 1897), an injunction suit, the court did not attempt to "estimate the compensation which, in a proceeding to condemn, should be awarded the appellant." It is significant that, although suggesting that if the defendant railroad company did not condemn the building which it had damaged it might be required to restore the building, the court refrained from ruling that restoration cost would be the measure of compensation in the condemnation action even though the question of such measure was raised. In *United States* v. *14.4756 Acres of Land*, 71 F. Supp. 1005 (Del. 1947); *United States* v. *Certain Parcels of Land in Baltimore*, 55 F.Supp. 257 (Md.

1944); and *In re Condemnation of Land for Military Camp*, 250 Fed. 314 (E.D. Ark. 1918), the only issue was whether the court would retain jurisdiction until possession was relinquished by the condemnor to determine restoration damage. When the court used, in those decisions, the words "jurisdiction to determine the cost of restoration" or similar ones, it was plainly applying a descriptive label to the issue rather than attempting to define the measure of the liability. In *United States* v. *266.33 Acres of Land*, 96 F.Supp. 647 (W.D. Wash. 1951), reversed on other grounds *sub nom. Phillips* v. *United States*, 205 F. 2d 867 (C.A. 9, 1953), the measure of damages was expressly not in issue (p. 648). The sole issue was whether the district court or the Court of Claims had jurisdiction to hear restoration damage. In *United States* v. *One Parcel of Land*, 131 F.Supp. 443 (D.C. 1955), "the Government wished to make at least a partial restoration of the property, which it proceeded to do" and terminated its tenancy by a notice which expressly reserved "the right of the owners to claim the reasonable cost of restoration of the premises and reasonable rent during the period of restoration" (p. 444).

Thus, appellants rely upon language from decisions taken out of context and which plainly were not rulings upon the issue presented here. Equally without force for the same reason is appellants' reference to authorities which announce that compensation under the Fifth Amendment "must be paid in money" (Br. 32-33) in an effort to establish that the Government may not discharge its liability by returning an al-

tered property of equal value to that taken. Appellants refer to this as compensation "by barter" (Br. 32). But the principal case upon which they rely, *United States* v. *Miller*, 317 U.S. 369 (1943), held that if the taking by the Government of part of a tract "has in fact benefited the remainder, the benefit may be set off against the value of the land taken" (p. 376). See also: *Bauman* v. *Ross*, 167 U.S. 548, 570 (1897); *Reichelderfer* v. *Quinn*, 287 U.S. 315, 323 (1932); *United States* v. *Grizzard*, 219 U.S. 180, 185-186 (1911); *Aaronson* v. *United States*, 79 F.2d 139, 140 (App.D.C. 1935); *United States* v. *Mills*, 237 F.2d 401 (C.A. 8, 1956); *United States* v. *2,477.79 Acres of Land in Bell County, Texas*, 259 F. 2d 23, 27-28 (C.A. 5, 1958). The question is whether, in the entire transaction, the landowners have been pecuniarily damaged.

III

THE UNITED STATES IS NOT REQUIRED TO PAY APPELLANTS FOR A USE WHICH THEY HAD ABANDONED PRIOR TO THE TAKING

As the district court found (R. 81; *supra*, p. 5) and stated in its opinion (R. 71): "When the Government seized these premises in 1951, it did not disrupt a going medical-dental operation, but seized the building after the owners had themselves vacated all the medical tenants in contemplation of demolition." Therefore, there is no basis for imposing a duty upon the United States to restore that medical-dental operation.

Also, as the court said (R. 71): "The changes effected by the government after taking possession

did not wreak havoc and destruction to the interior; what was accomplished was that the offices were converted to general office space." In these circumstances, there is no valid reason for departing from the settled rule in condemnation that a property is to be valued having in mind "all the uses for which it is suitable." *Olson* v. *United States*, 292 U.S. 246, 255 (1934).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court was correct and should be affirmed.

Respectfully,

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